

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. C 01-00419 CRB

Plaintiff,

**ORDER DENYING RULE 60(b)(6)
MOTION**

v.

JOSE LUIS MEDINA ALVARADO,

Defendant.

On August 3, 2012, Defendant Jose Luis Medina Alvarado filed a motion entitled Motion Pursuant to Federal Rules of Civil Procedures – Rule 60(b)(6) Requesting the Court to Recall the Order/Mandate Issued on June 4, 2003 to Correct an Injustice. See dkt. 348. The Court construes Defendant’s Motion as a successive habeas petition.¹ A claim presented in a second or successive petition under 28 U.S.C. § 2254 that was not presented in a prior petition must be dismissed unless it satisfies one of two sets of requirements. Under § 2244(b)(2)(A), the district court must dismiss a newly-presented claim in a second or successive petition unless the applicant “shows” that the “claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” Section 2244(b)(2)(B) permits a newly-presented claim where

¹ This Court denied Defendant’s first § 2255 motion. See dkts. 325, 332. The Ninth Circuit affirmed that denial. See dkt. 343.

1 (i) the factual predicate for the claim could not have been discovered previously
2 through the exercise of due diligence; and


3 (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a
4 whole, would be sufficient to establish by clear and convincing evidence that, but for
constitutional error, no reasonable factfinder would have found the petitioner guilty of
the underlying offense.

5 Defendant's Motion makes no effort to argue that either of the two sets of
6 requirements has been satisfied. Moreover, this Court lacks the authority to grant
7 Defendant's request, because Defendant must receive permission to file a subsequent petition
8 from the court of appeals. 28 U.S.C. § 2244(b)(3); see also 28 U.S.C. § 2255(h); United
9 States v. Allen, 157 F.3d 661, 664 (9th Cir. 1998).

10 Accordingly, Defendant's Motion is DENIED without prejudice.

11 **IT IS SO ORDERED.**

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13 Dated: October 2, 2012

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CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE